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No. 05-1157

In the Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC, ET AL.,

Petitioners,

v.

GLEN BILLING, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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TABLE OF CONTENTS

Page

I. IMMUNITY SHOULD BE IMPLIED UNDER *GORDON* AND *NASD* TO PERMIT THE SEC TO PERFORM ITS REGULATORY TASK 2

A. Carefully Calibrated SEC And NASD Standards Governing Book-Building Communications And Commissions Would Be Destroyed If Antitrust Suits Like These Could Be Maintained 2

B. Allegations That Defendants Engaged In Conduct Unlawful Under The Securities Laws Are No Bar To Implied Immunity 6

II. THE UNITED STATES' PROPOSED IMMUNITY TEST IS CONTRARY TO *GORDON* AND *NASD*, BUT NONETHELESS REQUIRES DISMISSAL OF THESE SUITS WITH PREJUDICE 8

A. The Solicitor General's "Inextricably Intertwined" Test Is Not The Implied Immunity Standard This Court Has Announced 9

B. Defendants' Alleged Conduct Is Immune Under An "Inextricably Intertwined" Standard 11

III. PLAINTIFFS OFFER NO OTHER BASIS FOR DENYING IMMUNITY 14

A. The Second Circuit's Implied Immunity Test Is Inconsistent With *NASD* And *Gordon* And Does Not Provide Certainty Or Predictability 15

B. Defendants Are Not Seeking "Blanket Immunity" From The Antitrust Laws For The Securities Industry 16

TABLE OF CONTENTS–Continued

Page

C. Defendants Are Entitled To Immunity From Pfeiffer's Commercial Bribery Claims 17

D. Denying Immunity Would Harm United States Capital Markets And Undermine Congress's Securities Litigation Reforms 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases: **Page**

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 10

Brown v. *Pro Football, Inc.*, 518 U.S. 231 (1996) 7

Central Bank of Denver v. *First Interstate Bank*, 511 U.S. 164 (1994) 16

Dirks v. *SEC*, 463 U.S. 646 (1983) 16

Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976) 14

Friedman v. *Salomon/Smith Barney, Inc.*, 313 F.3d 796 (2d Cir. 2002) 3, 11

Gordon v. *New York Stock Exch., Inc.*, 422 U.S. 659 (1975) ..... *passim*

Hughes Tool v. *TWA*, 409 U.S. 363 (1973) 7

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. *Dabit*, 126 S. Ct. 1503 (2006) 2, 19

Pan Am. World Airways, Inc. v. *United States*, 371 U.S. 296 (1963) 7

Silver v. *New York Stock Exch. Co.*, 373 U.S. 341 (1963) 14

Square D Co. v. *Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986) 11

U.S. Navigation Co. v. *Cunard S.S. Co.*, 284 U.S. 474 (1932) 8

United States v. *National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694 (1975) ..... *passim*

Verizon Communications Inc. v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) ..... *passim*

TABLE OF AUTHORITIES–Continued

Page

Statutes, Regulations, and Rules:

15 U.S.C. § 77z-3 6
15 U.S.C. § 78i(a)(6) 13
15 U.S.C. § 78j(b) 18
15 U.S.C. § 78o(c)(2)(D) 6
15 U.S.C. § 78mm 6
15 U.S.C. § 7246(a) 18
17 C.F.R. § 242.501(a) 18
17 C.F.R. § 242.502(a) 18
NASD IM-2440(b) 4
NASD Rule 2440 4
NASD Rule 2711 18
NYSE Rule 472 18

Miscellaneous:

1A PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW (3d ed. 2006) 16

Department of Enforcement v. *Invemed Assocs.*, No. CAF-030014 (NASD Office of Hearing Officers Mar. 3, 2006), available at http://www.nasd.com/RegulatoryEnforcement/Adjudication/OfficeofHearingOfficersDecisionsandProceedings/OHORedactedDisciplinaryDecisions/2006Decisions/NASDW_017083 ..... 4, 18

TABLE OF AUTHORITIES–Continued

Page

INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION (Nov. 30, 2006), available at http://www.capmktsreg.org/research.html 20

LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965).....18

S. REP. NO. 94-75 (1975).....2

SCHUMER & BLOOMBERG, SUSTAINING NEW YORK'S AND THE US' GLOBAL FINANCIAL SERVICES LEADERSHIP (Dec. 2006), available at http://www.senate.gov/~schumer/SchumerWebsite/pressroom/special_reports/2007/NY_REPORT%20_FINAL.pdf 20

SEC Litig. Release No. 18438 (Oct. 31, 2003).....18

SEC Release No. 34-46301 (Aug. 2, 2002) 18

SEC Release No. 34-2446 (Mar. 18, 1940).....3

5B WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE (3d ed. 2004).....13

This Court's precedents in the securities context demonstrate that immunity from the antitrust laws must be implied whenever an agency, acting pursuant to a specific grant of congressional authority, actively regulates the conduct at issue (*Gordon*, 422 U.S. at 688-689), or the regulatory scheme governing that conduct is so "pervasive" that Congress must be assumed to have "intended to lift the ban of the Sherman Act" from the challenged activities. *NASD*, 422 U.S. at 733. In both situations, there must also be a showing of "plain repugnancy" between the antitrust laws and the regulatory regime. *Gordon*, 422 U.S. at 682. This Court confirmed the importance of this doctrine in *Trinko*—which would have been a "good candidate" for implied immunity were it not for an antitrust savings clause—explaining that the benefits of antitrust litigation are "slight" when a "regulatory structure [is] designed to deter and remedy anticompetitive harm." The costs, by contrast, are substantial, because the risk of "false condemnations" inevitably "chill[s]" beneficial conduct permitted by regulators and "distort[s] investment." 540 U.S. at 406, 412, 414. This immunity standard is satisfied here. The conduct plaintiffs allege—agreements inferred from communications between underwriters and potential purchasers of newly issued securities—is subject to active and pervasive SEC regulation that takes competition into account. And the threat of treble damages liability would displace nuanced SEC regulation, deterring conduct that the SEC deems important to capital formation.

The United States has proposed a new test for immunity different from the one articulated by this Court—whether conduct is "explicitly or implicitly" permitted by the securities laws or is "inextricably intertwined" with such conduct—but agrees that the Second Circuit's decision cannot stand. Amicus briefs filed by the NASD, NYSE, and organizations representing underwriters and securities issuers attest to the danger that plaintiffs' claims pose to the scheme of regulation that has fostered the Nation's capital markets. Nothing

plaintiffs or their amici say refutes our showing that the Second Circuit erred and that immunity should be implied here so that "competition" does not "become paramount to the great purposes of the Exchange Act" (S. REP. NO. 94-75, at 14), which as applied by the SEC "anchor[s]" public policy in the field of securities regulation. *Dabit*, 126 S. Ct. at 1509.

I. IMMUNITY SHOULD BE IMPLIED UNDER *GORDON* AND *NASD* TO PERMIT THE SEC TO PERFORM ITS REGULATORY TASK.

Plaintiffs' primary argument against immunity (Billing Br. 12-22) is that there can be no "plain repugnancy" from application of the antitrust laws because, even though most of the conduct challenged is permitted and even encouraged by the SEC, the alleged tie-ins and excessive commissions are prohibited under the securities laws. That assertion turns on a misunderstanding of the public offering process and its regulation, as well as of this Court's immunity precedents.

A. Carefully Calibrated SEC And NASD Standards Governing Book-Building Communications And Commissions Would Be Destroyed If Antitrust Suits Like These Could Be Maintained.

Capital formation depends not only on selling shares, but also on their performance in the aftermarket, because investors purchase in anticipation of what will happen next. Communications between syndicate underwriters and potential IPO purchasers with respect to the purchasers' intentions in the aftermarket are therefore "essential" to capital formation. Pet. App. 223a; see Pet. Br. 3-5. As the SEC recognizes, such conversations—about intentions to hold shares acquired in the IPO, possible future purchases of the stock at particular prices, and investors' anticipated positions—enable underwriters to determine the price and size of the offering that is likely to raise the most money for the issuer without undue risk of a falling price in the aftermarket. Pet. App. 224a-227a. Only if the price is stable or increases in the aftermarket will the offering be successful for the issuer *and* the IPO allo-

cants. When IPO allocants "flip" shares the aftermarket may be destabilized and stock prices go down—a "serious problem" that "preclude[s] the success of the financing" and threatens the underwriters' ability to sell future IPOs. SEC Release No. 34-2446, at 4 (Mar. 18, 1940); *Friedman*, 313 F.3d at 801.

These conversations among competitors and with customers, touching on prices and quantities in potential future transactions, might be problematic under the antitrust laws, and they need to be closely governed in the public offering process as well—but by an expert agency that has regard not only to competition concerns but also to the needs of markets and investors. Congress charged the SEC with setting limits on such conversations that balance goals of capital formation, investor protection, and competition. There is no question that the SEC has carried out this mandate. See Pet. App. 129a-139a; Pet. Br. 8-15. The SEC's pervasive regulatory scheme encompasses all aspects of the IPO process, communications with purchasers, and commission arrangements, and protects the aftermarket from manipulative effects. Pursuant to that scheme the SEC and NASD actively regulate "the very conduct alleged in this action." Pet. App. 110a.

For decades the SEC has addressed tie-in agreements during "hot markets," issuing detailed studies and reports, proposed rules, and staff bulletins and bringing enforcement actions against underwriters alleging "conduct very similar, if not identical, to that alleged" here. Pet. App. 110a, 118a; J.A. 63. In its most detailed pronouncement on book-building communications to date, the SEC issued guidance instructing that underwriters may make inquiries designed to identify prospective customers who are interested in holding their IPO shares and adding to their position in the stock and may determine the "prices at which the customer might accumulate that position," but may not "induce aftermarket bids or purchases." Pet. App. 224a-225a. The determination whether a communication has "cross[ed] the line" to become an

unlawful inducement to purchase stock in the aftermarket, the SEC has stated, "depends on the particular facts and circumstances surrounding" the communication. *Id.* at 225a. Applying the SEC's standards, the United States acknowledges, "present[s] close and difficult questions." U.S. Br. 20.

Similarly, successful offerings also depend in part on the relationships between underwriters and their customers. The SEC accordingly permits underwriters to allocate IPO securities to their best customers, taking into account the total compensation the customer pays to the underwriters. See Pet. Br. 4-5. Whether compensation paid to defendants was "excessive" under NASD rules and unlawfully induced by syndicate members, or instead reflects a legitimate payment based upon a customer's recognition of valuable services, depends on fine lines embodied in regulatory standards. See NASD Rule 2440; NASD IM-2440(b). Seemingly generous commissions are often permissible because under SEC and NASD regulations customers may pay not only for a particular execution but also for a wide range of services rendered over time, including IPO allocations. *Ibid.*; Pet. App. 106a-107a. Only careful application of these detailed standards to the circumstances of a particular payment can reveal whether it was permissible. For instance, in the *Invemed* case an NASD panel—after hearing 17 expert witnesses, reviewing thousands of pages of evidence, and conducting a three-week trial—held that large commissions paid by a handful of customers to one brokerage firm were lawful. *Invemed* vividly illustrates the subtle inquiry that is necessary.

Antitrust adjudication would substantially interfere with the SEC's careful regulation of these matters. Judges and juries lacking expertise in the nature of underwritings and applying antitrust law's "competition first" policies would strike different balances than expert SEC regulators and reach different results as to whether particular conversations or commission payments were unlawful. Antitrust courts would also decide whether unreasonable compensation was

in fact paid or a tie-in purchase made. For millions of transactions stemming from 900 separate IPOs, the jury would have to make these judgments using antitrust standards differing fundamentally from those applied by the SEC and NASD. The threat of antitrust verdicts would necessarily alter underwriter conduct during the IPO process, deterring behavior that the SEC promotes. Accordingly, it is not enough for plaintiffs to characterize conduct, from the ex post perspective of their complaint, as "clearly unlawful." The threat of treble damages verdicts would distort underwriters' behavior in ways inconsistent with the SEC's objectives.

The danger of conflict is magnified because plaintiffs would necessarily ask the antitrust court to draw inferences that impermissible tie-ins occurred from circumstantial evidence. For example, underwriters typically make concise notations of customer responses to permissible book-building inquiries, which might read "buyer up to 45" or "needs 40,000 shares to get started." Plaintiffs would urge an antitrust jury to find, based on such ambiguous evidence, that underwriters crossed the line into prohibited conduct. And, they would undoubtedly try to prove a conspiracy by showing that a number of syndicate members crossed the line into prohibited conduct. Antitrust courts would not decide such questions by applying the carefully crafted standards the SEC has developed for distinguishing between permissible and impermissible conversations—they would instead consider the conduct through an antitrust lens that looks skeptically at conversations among competitors and discussions of future prices. There is an overwhelming likelihood that an antitrust court would decide the issue differently than the SEC. These practical realities—not plaintiffs' characterizations of conduct as unlawful—are decisive in evaluating the risk of conflict under *NASD* and *Gordon*. Pet. App. 156a, 191a.

If antitrust courts were allowed to make such judgments and mete out treble damages in class actions, antitrust concerns would become "the predominant considerations" in un-

derwriting and market participants would be discouraged from engaging in book-building practices that the SEC recognizes "serve the interests of the markets and the capital formation process." Pet. App. 193a-194a; see *id.* at 196a-197a (the "*in terrorem* effect" of antitrust litigation would "distort market participant behavior" in ways "harmful" to the securities markets). As a practical matter, trial lawyers and juries would draw the lines defining permissible conduct. See Pfeiffer Br. 26 ("[t]hese determinations cannot be put in the hands of the SEC"). The detailed distinctions drawn by the SEC would become meaningless, thwarting the SEC's "ability to interpret, apply, and revise the governing law" in light of developing facts or knowledge. Pet. App. 194a. In such an uncertain environment underwriters would be less likely to risk their capital by underwriting offerings.[1]

B. Allegations That Defendants Engaged In Conduct Unlawful Under The Securities Laws Are No Bar To Implied Immunity.

Plaintiffs' contention (Billing Br. 19-20) that the conduct they allege cannot be immune because they label it as unlawful is also refuted by this Court's precedents. Those decisions make clear that the immunity inquiry focuses not on plaintiffs' characterizations or on whether all of the challenged conduct is currently permitted under the securities laws, but rather on whether application of the antitrust laws creates an

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[1] Plaintiffs contend (Billing Br. 16) that tie-ins are barred outright by Securities Act § 17(a) and Exchange Act § 9(a) and § 15(c). But those prohibitions are not self-defining. Congress gave the SEC authority to "define" fraudulent and manipulative practices. Pet. App. 132a; 15 U.S.C. § 78o(c)(2)(D). It also conferred discretion on the SEC to grant exemptions "even with respect to statutory prohibitions and requirements." Pet. App. 149a; see 15 U.S.C. §§ 77z-3, 78mm. There is no doubt that the SEC has the power to determine whether conduct crossed the line between permissible book-building and manipulation in accordance with the standards set forth in its 2005 guidance. Pet. App. 216a-233a.

actual or potential conflict with the SEC's authority over the activities at issue so that implied immunity is necessary to make the regulatory scheme work as Congress intended. See *NASD*, 422 U.S. at 734; *Gordon*, 422 U.S. at 691 (immunizing fixed commission rates despite their prohibition by the SEC, because interposition of the antitrust laws would conflict with Congress's determination to leave supervision of this conduct to the SEC).

Thus in *NASD*, the Court held that its conclusion that horizontal agreements to foreclose a secondary market were immune had "equal force" *after* the SEC, which previously condoned the agreements, changed course and decided to eliminate barriers to competition in the secondary market, announcing that it would "take action with respect to the very conduct at issue," including "direct regulatory action" under Section 22(f). 422 U.S. at 734; SEC Br. in *NASD*, at 22-23; see U.S. Reply Br. in *NASD*, at 10 (the SEC had "ruled that impediments to a secondary brokerage market are inconsistent with the general objectives of the securities laws"). The alleged illegal conduct in *Trinko*, which would have been a "good candidate" for antitrust immunity absent a savings clause, resulted in Verizon entering into a consent decree and paying substantial compensation. 540 U.S. at 403-404, 406.

Contrary to plaintiffs' argument (Billing Br. 42-43), this Court has repeatedly found immunity despite claims of illegality under administrative law. *E.g.*, *Brown*, 518 U.S. at 238, 252-254 (implying immunity where the propriety of defendants' actions under the labor laws turned on satisfying "carefully circumscribed conditions" and, the dissent made clear, defendants' conduct was of questionable legality); *Hughes Tool* v. *TWA*, 409 U.S. 363, 383, 386 (1973) (implying immunity even though Hughes' corporate control of air carrier was "unacceptable" and "faulty" under CAB regulations); *Pan Am.*, 371 U.S. at 310-313 (dismissing antitrust challenge to an arrangement condemned by the CAB where the issues presented in the complaint were entrusted to the

CAB and the "two regimes" of antitrust and aeronautical law "might collide"); *U.S. Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 485 (1932) (charges of Shipping Act violations "supersede[d] the anti-trust laws"); SIFMA Br. 15-25. As in *Gordon* and *NASD*, these decisions turned on the threat of conflict to the regulatory regime posed by application of the antitrust laws, not on whether all the specific conduct at issue was authorized under that regime. And they leave no doubt that the immunity doctrine may not be evaded simply by labeling the actions at issue as "clearly unlawful."

NASD, *Gordon*, and *Trinko* recognize that when an expert agency effectively regulates a complex subject such as bookbuilding, an overlay of private treble damages litigation threatens redundancy, distorted investment, and disruption of administrative policy. Given the adequacy of administrative supervision and private actions under the securities laws, there is no practical or legal justification for plaintiffs' campaign to convert ordinary securities claims into antitrust claims.

II. THE UNITED STATES' PROPOSED IMMUNITY TEST IS CONTRARY TO *GORDON* AND *NASD*, BUT NONETHELESS REQUIRES DISMISSAL OF THESE SUITS WITH PREJUDICE.

The United States, in a brief signed by the SEC, Antitrust Division, and FTC, agrees with much of our legal analysis. Contradicting plaintiffs' principal argument, the government states that because implied immunity serves "the imperative need to avoid conflict with the securities regulatory regime" it is not "limited to conduct that is expressly or implicitly authorized under the securities laws." U.S. Br. 12, 25. What matters for immunity "is not whether a regulatory violation has been alleged" but whether an antitrust challenge "could interfere with the regulatory scheme." *Id.* at 12-13, 24. The United States thus agrees that implied immunity extends to conduct "not * * * specifically approved by the SEC" because an antitrust suit aimed at activities "'directly related to

the SEC's responsibilities poses a substantial danger'" that market participants could be subjected to "'duplicative and inconsistent standards.'" *Id.* at 13 (quoting *NASD*). In all these observations the United States properly focuses on the scope and nature of the regulator's responsibilities.

The Solicitor General nevertheless proposes a different test: that implied immunity extends only to conduct that is permitted under the securities laws or conduct "ancillary to," "inextricably intertwined with," or that "cannot practicably be separated from" permitted activities. U.S. Br. 12-13. That novel test misperceives this Court's precedents and fails to protect the regulatory scheme—the very purpose of implied immunity. In any event, it is readily satisfied here and would require dismissal of both complaints with prejudice.

A. The Solicitor General's "Inextricably Intertwined" Test Is Not The Implied Immunity Standard This Court Has Announced.

The Solicitor General's "inextricably intertwined" test—a compromise between opposing positions of the SEC and DOJ (U.S. Br. 5 n.3)—is not the implied immunity standard this Court announced in *Gordon* and *NASD* and confirmed in *Trinko*. That new test (never adopted by any court or advocated by any agency) would make immunity turn on the relationship between challenged conduct and practices that are "authorized." But this Court has made clear that the relevant connection is between challenged "activities" and the SEC's regulatory "responsibilities"—an inquiry designed to ensure that the SEC can "carry out [those] responsibilit[ies] free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws." *NASD*, 422 U.S. at 734-735. This focus on the expert agency's responsibilities is especially important where, as here, Congress charged the agency with "perform[ing] the antitrust function" (a statutory requirement nowhere acknowledged in the Solicitor General's brief). *Trinko*, 540 U.S. at 412; see *NASD*, 422 U.S. at 732-733; Pet. Br. 9-10.

As a practical matter, the novel standard proposed by the United States would not prevent the repugnancy between the antitrust laws and the securities regulatory regime that the implied immunity doctrine is designed to avoid. Even the horizontal conspiracy to suppress competition in the secondary mutual fund market, held immune in *NASD* because it was "directly related" to SEC "responsibilities" within a "pervasive regulatory scheme," would not have been immune under the government's test because the SEC had brought "competition into the secondary market" and disapproved the challenged restraints. 422 U.S. at 734-735. As the NASD has emphasized, by "plac[ing] undue emphasis on whether particular actions are explicitly authorized by the securities laws," the government's test "limits the range of market activities" in which industry participants are likely to engage "to those authorized in unambiguous terms" and "compels [underwriters] to forgo other—legal—activities for fear that a court might find that an action was not authorized by those laws." NASD Br. 22. This standard thus "conflicts with Congress's intention to use broad grants of regulatory authority to foster innovative efforts by market participants and regulators to develop capital and promote competition." *Ibid.*

In addition, the key concepts in the government's test—whether conduct is "ancillary" to and "inextricably intertwined" with "expressly or implicitly authorized" activities—are abstract and ambiguous and fail to provide the practical guidance that this Court has recognized is vital to securities market participants. *Blue Chip Stamps*, 421 U.S. at 742-743. The government's standard would undermine the purposes of the implied immunity doctrine by fostering extensive litigation over the meaning of these terms and encouraging artful pleading by plaintiffs seeking to avoid an immunity defense. See NASD Br. 23; SIFMA Br. 3 (under the United States' vague standard, plaintiffs could potentially "plead around an immunity defense and thereby gain discovery and possible class certification," destroying the very purpose of immunity). The reaction of market participants would almost cer-

tainly be avoidance of any conduct—even if the SEC does not currently prohibit it and believes it serves beneficial purposes (such as the restrictions on flipping upheld in *Friedman*, 313 F.3d 796)—that has not specifically been blessed by the SEC or NASD.[2]

As we have shown (Pet. Br. 23-34), immunity must be implied here under *NASD* and *Gordon* because the IPO process (including the IPO aftermarket) is subject to a pervasive scheme of SEC regulation, the SEC has actively exercised its authority over all of the challenged conduct, and the requisite repugnancy exists. This Court should not abandon the clear-cut legal standards laid down in those decisions, which have governed implied immunity for 30 years with no sign—prior to the Second Circuit's decision—that they are difficult for courts to apply or for regulators and industry members to comprehend.[3]

B. Defendants' Alleged Conduct Is Immune Under An "Inextricably Intertwined" Standard.

The Solicitor General's novel test is contrary to established law and should not be adopted, but in any event is met

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[2] The *Noerr-Pennington* and commercial speech doctrines cited by the Solicitor General in support of his novel test are inapposite. They have nothing to do with accommodating antitrust law to a detailed regulatory scheme entrusted by Congress to an expert agency that performs the antitrust function and that makes nuanced judgments concerning complex, fast-changing markets.

[3] Application of *NASD* to this case could not impair government enforcement prerogatives. *NASD* was a government enforcement proceeding and it established legal rules that have applied to such cases for the last 30 years. Thus, this Court need not address whether finding immunity here would "oust" government antitrust enforcement. U.S. Br. 22. Moreover, the concerns expressed by the SEC to the lower courts focused on private treble damages actions, not government enforcement actions. This Court recognizes the substantial differences between the two. *Square D Co.* v. *Niagara Frontier Tariff Bur.*, 476 U.S. 409, 421-422 & n.28 (1986).

in this case. It requires reinstatement of the district court's order dismissing the complaints with prejudice.

1. All the conduct alleged in plaintiffs' complaints is permitted by the securities laws or "inextricably intertwined" with permitted conduct. The United States acknowledges that Congress knew of syndicated underwriting when it adopted the securities laws and "chose regulation rather than prohibition," with the result that "[c]ollaborative activity in the formation and operation of an underwriting syndicate [must] be deemed immune." U.S. Br. 12. The United States recognizes that authorized syndicate activities include "book-building," during which underwriters "discuss price and demand with * * * potential investors" to aid them in the "difficult task" of determining the "'quantity and pricing'" of the offering and "'how to allocate the IPO shares to purchasers.'" *Ibid.*

According to the United States, defendants are immune from plaintiffs' "vague and conclusory allegations" that they required customers to pay excessive commissions and make tie-in purchases if that conduct "is so closely related to approved collaboration in the course of underwriting an IPO that it cannot, as a practical matter, be readily distinguished and separately proved without impermissibly chilling permitted conduct." U.S. Br. 20-21, 24. That close relationship is established, we have explained (*supra*, Part I.A), because SEC and NASD rules draw fine lines between permissible and impermissible conduct of both types that would be obliterated by antitrust litigation. It is clear too from the fact that all of the specific allegations upon which plaintiffs rely to establish the concerted-action element of their Sherman Act claim describe conduct permitted by the SEC. J.A. 27-31, Billing Compl. ¶¶ 44-64. Indeed, plaintiffs admit that the "prohibited agreement was made and implemented" through "otherwise permitted syndicate conduct." Billing Br. 24. The complaints conclusively show—not just "strongly suggest"—that the alleged "conspiracy is no more than an inference that respondents have drawn from protected collaboration." U.S.

Br. 27. Imposing "antitrust liability (or even allowing the unleashing of costly discovery) on the basis of [such] inferences" would discourage permissible book-building, creating a "direct conflict with the regulatory scheme." *Id.* at 15.

2. The government suggests (at 21) that immunity should not extend to "an express horizontal agreement to restrict competition through [unlawful IPO] practices" that is reached "outside the scope of the collaboration in underwriting and promoting a particular IPO." As the government observes, however (at 23-24), all of plaintiffs' specific allegations seeking to establish a conspiracy describe behavior permitted by the SEC. Although plaintiffs contend that conspiracy may be inferred from non-syndicate conduct (Billing Br. 32-34), they offer only conclusory assertions that defendants discussed the operation and effect of tie-ins and monitored underwriter and customer compliance across multiple underwritings. Even if properly pleaded, such claims are subject to dismissal because they challenge joint conduct that is closely connected with the syndicated underwriting process and that plaintiffs concede is well within the scope of SEC and SRO regulation of IPOs. See Billing Br. 18 (Exchange Act legislative history shows the Act was directed at concerted manipulation by "pools"); *NASD*, 422 U.S. at 730-735 (holding immune an overarching conspiracy among NASD members over which the SEC had "broad regulatory authority"); 15 U.S.C. § 78i(a)(6); Pet. Br. 8-9.

3. Dismissal is required under the ordinary notice pleading standards of Rule 8. Implied immunity is a "legal question" that arises from the face of plaintiffs' complaints. *Gordon*, 422 U.S. at 688; Pet. App. 76a-77a. The SEC's detailed demonstration that immunity is necessary was part of the record in the district court. *Gordon*, 422 U.S. at 685; 5B WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1357, at 376 (3d ed. 2004). As in *NASD*, the immunity issue is appropriately resolved at the earliest stages of the litigation. 422 U.S. at 734-35.

The United States suggests that to the extent the complaints are "ambiguous" as to whether plaintiffs' antitrust claims "rely on authorized conduct," plaintiffs should be given the opportunity to replead. U.S. Br. at 27-28. There is no ambiguity. Stripped of allegations of permitted conduct the complaints fail to allege an antitrust conspiracy. Even if plaintiffs could plead a conspiracy without relying on inferences from authorized conduct, antitrust courts still could not practicably separate alleged tie-ins and excessive commissions from conduct permitted by the SEC and NASD. *Supra*, Part I.A. And although the Billing plaintiffs now say (at 10) that they are challenging only "abuses" of conduct permitted by the SEC, allowing an antitrust court to determine what is an "abuse" of an authorized practice would risk the very conflicting judgments that immunity is designed to prevent.

Because it is clear that plaintiffs' claims cannot be saved from implied immunity by repleading, reinstatement of the district court's order dismissing the complaints with prejudice is the proper disposition. In addition, plaintiffs chose to stand on their complaints after the district court rendered its decision. Rather than seek leave to amend, they took appeals based on the complaints at issue. Plaintiffs have thereby waived any right to replead. Pet. Br. 49 n.6 (citing authority); *NASD*, 422 U.S. at 697, 374 F. Supp. at 114 (affirming dismissal with prejudice after clarifying the antitrust immunity standard); *Hochfelder*, 425 U.S. at 215 (declining to remand because throughout the "lengthy history" of the case plaintiffs rested on the theory the Court found legally insufficient).

III. PLAINTIFFS OFFER NO OTHER BASIS FOR DENYING IMMUNITY.

Plaintiffs place great weight on this Court's statements that implied immunity is "not favored" and that antitrust law should be reconciled, not "ousted." Billing Br. 13. But the same decisions recognize that immunity *must* be implied when there is "clear repugnancy" and immunity is "necessary to make the [regulatory scheme] work." *Silver*, 373 U.S. at

357; *NASD*, 422 U.S. at 719-720. For some conduct, "[t]here can be no reconciliation of [the SEC's] authority" with antitrust liability. *NASD*, 422 U.S. at 729. *Gordon* and *NASD* make clear that implied immunity extends beyond conduct that is permitted by the SEC. To avoid conflict with the SEC's regulatory responsibilities, immunity also encompasses conduct that may or may not be permitted by the agency depending on the circumstances and prohibited conduct regulated under evolving administrative standards. *Gordon*, 422 U.S. at 676, 685-689; *NASD*, 422 U.S. at 729-730, 735. All the conduct alleged by plaintiffs falls within these categories. Neither plaintiffs nor their amici have explained why immunity should not be implied in these circumstances.

A. The Second Circuit's Implied Immunity Test Is Inconsistent With *NASD* And *Gordon* And Does Not Provide Certainty Or Predictability.

Plaintiffs defend the Second Circuit's implied immunity test (Billing Br. 13), but it "fails to provide adequate protection" for the securities regulatory scheme. U.S. Br. 23. The Second Circuit treated the "pervasive regulation" prong of immunity as "vague," disfavored, and limited to SRO activities. Pet. App. 50a. But in fact it was applied by this Court in *NASD* to confer immunity on a horizontal conspiracy involving private parties, and the Court relied on SEC regulation far less pervasive than the SEC's oversight of public offerings and commissions. 422 U.S. at 733-735. The Second Circuit assumed that the SEC permitted those industry-wide horizontal restraints when in fact the SEC had criticized them and threatened enforcement actions. *Ibid.*; SEC Br. in *NASD*, at 22-23; U.S. Reply Br. in *NASD*, at 6, 10.

The court of appeals would find immunity based on potential conflict only if "Congress contemplated the specific conduct and intended for the antitrust laws to be repealed"—judged in light of a hodgepodge of fact-intensive considerations—which largely obliterates the distinction between im-

plied and express immunity. Pet. App. 57a; see 1A AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 243d, at 319. Moreover, the court failed to understand that the SEC has to make fine-line judgments in the areas of conduct at issue and that its discretion to define and remedy manipulation while promoting capital formation would be infringed if antitrust courts and juries could make their own judgments under rule of reason principles. In short, the Second Circuit misunderstood this Court's precedents and failed to appreciate the practical regulatory needs that the immunity doctrine is designed to serve.

That the Second Circuit said its five criteria are non-exclusive and flexible in application makes them less, not more, compatible with precedent and good sense. Its multi-factor analysis promises only confusion and uncertainty in an area where "certainty and predictability" are necessary to promote capital formation. *Central Bank*, 511 U.S. at 188; see *Dirks* v. *SEC*, 463 U.S. 646, 658 & n.17 (1983) (criticizing "imprecise" rules, which have an "inhibiting influence" on market participants). As in *Trinko*, application of the antitrust laws would result in overdeterrence and regulatory disruption. 540 U.S. at 414.

B. Defendants Are Not Seeking "Blanket Immunity" From The Antitrust Laws For The Securities Industry.

Plaintiffs, their amici, and the United States assert that if these complaints were entitled to immunity under the "pervasive regulation" prong as well as the "active regulation" prong of implied immunity, as defendants contend, the antitrust laws would be entirely "ousted" from application to the securities industry. Billing Br. 21; N.Y. Br. 12; U.S. Br. 16. That assertion is meritless.

As defendants have consistently recognized, immunity under the "pervasive regulation" standard is appropriate only when the challenged activities are subject to a pervasive regulatory scheme *and* application of the antitrust laws to

that conduct would conflict with and be "plainly repugnant" to the operation of the scheme. *Gordon*, 422 U.S. at 682; *NASD*, 422 U.S. at 719. Accordingly, this Court's determination in *NASD* that Congress's "investiture of such pervasive supervisory authority in the SEC" over the horizontal agreements at issue rendered them immune did not remove all NASD member or mutual fund conduct from antitrust scrutiny. 422 U.S. at 733. For example, defendants agree with the United States that a decision granting immunity here would not prevent an antitrust challenge to a naked agreement among underwriters to allocate exclusive territories for the placement of new brokerage offices. U.S. Br. 20. In this case, however, both the pervasive regulation and repugnancy showings have been made, entitling defendants to immunity.

C. Defendants Are Entitled To Immunity From Pfeiffer's Commercial Bribery Claims.

Pfeiffer contends (at 7, 10) that his complaint, unlike *Billing*, focuses on activity in the aftermarket. Pfeiffer alleges that underwriters allocated IPO securities to institutional defendants on the condition that they "purchase additional large quantities of the security in the aftermarket," pay large commissions on open market trades, and comply with other "restrictive conditions" in the aftermarket. J.A. 52, 54-56; see Pet. App. 18a-19a. But the *Billing* complaint makes the very same allegations: to inflate "aftermarket prices" defendants required customers "in order to obtain IPO shares" to buy a class security "in the aftermarket" and to pay "non-competitively determined commissions" on open market trades. J.A. 13. Though dressed up differently, both claims are the "same." Pet. App. 75a, 128a n.1. Merely labeling the commission payments as "commercial bribes" does nothing to change the implied immunity analysis.

The aftermarket demands, alleged in both cases to have been tied directly to IPO allocations, were actively and pervasively regulated. Under the Exchange Act, the SEC enjoys "plenary" authority to regulate "aftermarket trading" (Pet.

App. 132a), as Pfeiffer's brief confirms (at 19-25). And here the SEC and NASD brought enforcement actions directed at both aftermarket laddering and commission payments. Pet. Br. 14-15. The *Invemed* case—in which an NASD panel held payments of exactly the type Pfeiffer characterizes as bribes to be lawful—illustrates the fact-intensive inquiry necessary to determine whether a particular commission is permissible or not under regulatory standards. *Supra*, p. 4. This Court's decisions thus require implied immunity from Pfeiffer's claims as surely as from Billing's. The generalized standards of Section 2(c) of the Robinson-Patman Act (Pfeiffer Br. 15-18), like Section 1 of the Sherman Act, virtually guarantee that antitrust courts and juries awarding treble damages will reach decisions contrary to those made by expert regulators.[4]

D. Denying Immunity Would Harm United States Capital Markets And Undermine Congress's Securities Litigation Reforms.

Plaintiffs oppose immunity to maximize their damage claims. Pfeiffer Br. 11. But investors are pursuing 300 suits under the securities laws based on the same allegations. And under the Sarbanes-Oxley Act, the SEC may earmark amounts recovered in enforcement actions "for the benefit of the victims." 15 U.S.C. § 7246(a). As in *Trinko*, antitrust suits would just add "a new layer of interminable litigation atop the variety of litigation routes" already pursued. 540 U.S. at 414; see also LOUIS L. JAFFE, JUDICIAL CONTROL OF

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[4] Pfeiffer's allegations that research analysts inflated prices do not escape immunity. The SEC has plenary authority to regulate analyst reports (15 U.S.C. § 78j(b)) and actively responded to allegations that "favorable research" was used to market investment banking services. SEC Release No. 34-46301 (Aug. 2, 2002). The SEC and SROs have engaged in rulemaking (*ibid.*; 17 C.F.R. §§ 242.501(a), 242.502(a); NASD Rule 2711; NYSE Rule 472) and enforcement directed at such allegations. SEC Litig. Release No. 18438, *Federal Court Approves Global Research Analyst Settlement* (Oct. 31, 2003).

ADMINISTRATIVE ACTION 151 (1965) (criticizing the "dogmatic assumption" that "the premises of antitrust are presumptively more in the public interest than those underlying the regulatory statutes").

Plaintiffs point to lower court antitrust rulings in the securities field as evidence of the beneficial application of the antitrust laws, but they are easily distinguishable. Billing Br. 44-48. In none of those cases did the SEC urge the necessity of immunity. In the vast majority the defendants did not raise an immunity defense. And many predate the modern development of implied immunity doctrine. As this Court has emphasized, each immunity claim must be analyzed in light of the particular industry, regulatory scheme, and conduct involved. *Gordon*, 422 U.S. at 663.

The United States acknowledges the concern, voiced by the SEC below, that the risk of "treble damages awards by federal juries applying the antitrust laws will unduly disrupt the capital formation process." U.S. Br. 21; Pet. App. 193a-194a. The United States explained in its brief in *Tellabs* v. *Makor Issues*, No. 06-484, at 22, that "[i]f a securities case is not dismissed at the pleading stage, the practical reality is that the defendant will usually be forced to settle." That is especially true in antitrust class actions demanding treble damages. IPO participants will avoid conduct that an antitrust jury may label as anticompetitive rather than risk blackmail settlements, with the result that antitrust concerns will override the SEC's scheme of regulation. Pet. App. 194a.

Plaintiffs deny the relevance of Congress's efforts to reform securities litigation to prevent such blackmail settlements. But given Congress's consistent attempts to end "abuses of the class-action vehicle" in the securities field (*Dabit*, 126 S. Ct. at 1510-1511), it is entirely appropriate to apply the implied immunity doctrine to dismiss securities claims like these dressed in antitrust clothing. Permitting such a pleading tactic "is hardly a result that Congress would have mandated." *NASD*, 422 U.S. at 735. The incongruities

between private antitrust and securities litigation are a "legitimate" part of the repugnance inquiry. U.S. Br. 21.

Costly and burdensome securities litigation—defying Congress's efforts to curtail it—is a significant factor in driving stock offerings to overseas and private equity markets. SCHUMER & BLOOMBERG, SUSTAINING NEW YORK'S AND THE US' GLOBAL FINANCIAL SERVICES LEADERSHIP i-ii, 10, 16-17, 101 (Dec. 2006); INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION ix-x, 29-34, 46 (Nov. 30, 2006). Because virtually any syndicate conduct that could be pleaded as manipulation or deception under the securities laws could also be pleaded as an antitrust violation warranting treble damages, denying immunity in these cases would accelerate that harmful trend. Pet. Br. 41; SIFMA Br. 27-28. It would encourage vexatious litigation designed to secure multi-million (or billion) dollar settlements, which would cause issuers to look elsewhere to raise capital, chill syndicate underwriting, and deter underwriters from conducting the book-building that the SEC says is "necessary to the offering process." U.S. Br. 25-26; Pet. App. 127a, 157a, 193a-194a. A surer recipe for disruption of "this crucial segment of the economy" is hard to imagine. Pet. App. 157a.

CONCLUSION

The judgment of the court of appeals should be reversed and the district court's judgment dismissing the complaints with prejudice should be reinstated.

Respectfully submitted.

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